No. 15141

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARTHOLOMAE CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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APPELLANT'S PETITION FOR REHEARING.

Appellant, Bartholomae Corporation, pursuant to Rule 23 of this Court respectfully petitions for a rehearing of its appeal upon the following grounds:

1. This Court has erred in holding that appellant failed to prove that concussions from the atomic explosions were the *proximate cause* of the damage to the buildings owned by appellant (p. 5).[1]

2. This Court has erred in holding that there was *any* evidence that such damage was caused by "other forces" (p. 5).

3. This Court has erred in holding that appellant has disregarded entirely the law of Nevada (p. 4).

4. This Court has erred in entirely disregarding and in failing to rule upon the application here, in favor of plaintiff, of the doctrine of *res ipsa loquitur*.

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[1]References, unless otherwise identified, are to pages of the white advance report of this Court's opinion.

5. This Court has erred in holding that the entrance of the shock waves, caused by these atomic explosions, upon appellants property was not a trespass at common law (p. 4).

6. This Court has erred in holding that the use of 3 out of 8 microbaragraphs in the same direction and the omission to use any to the north was not that *slight negligence* sufficient to support a judgment for appellant.

7. This Court has erred in holding that there was no partial taking of appellant's property.

8. This Court has erred in not reversing the judgment of the district court with directions to enter judgment for appellant.

Preliminary Statement.

Appellant is not so naive to believe that after the lengthy consideration this Court gave this appeal before announcing its decision of August 15, 1957, it could now be persuaded to change its judgment to the extent of reversing the lower Court. We are now concerned with persuading this Court to *continue its jurisdiction* by granting this petition for rehearing so that it can correct *patent errors,* which if not corrected or deleted would probably preclude any possibility that appellant could persuade the Federal Supreme Court to even *consider* a petition for certiorari because of that Court's long standing rule that it will not inquire into the verity of the facts as recited in the opinion of the Appellate Court.[2]

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[2]FACTUAL ISSUES. The Supreme Court will usually deny certiorari * * * to review a factual issue—or to reverse on such an issue if certiorari is granted for some other reason—where the findings of fact made by the district court receive the concurrence of the court of appeals. In that situation the Court has often held

Appellant understands the reluctance of this Court to attempt to distinguish this cause from that presented in *Dalehite v. United States*[3] and its apparent unwillingness to extend the concept of a constitutional taking beyond the definition stated in *United States v. Dickinson*[4], even though, as we showed by our briefs, the facts in those cases and the facts here are completely different and neither this Court nor the Supreme Court has ever previously passed upon a case in which these *admitted* factual circumstances existed: (1) the actions taken were compulsory[5] (p. 5); (2) the forces released were uncontrollable and unpredictable[6] (p. 5); (3) the United States was in complete charge and knew from *previous experience* that such released forces (shock waves) were capable of extreme, erratic and uncontrollable destruction and property damage[7] and (4) that similar tests had caused widespread damage in the past.[7]

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that "a court of law, such as this Court is, rather than a court for corrections of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U. S. 271, 275, and cases cited, *idem*, 339 U. S. 605.

Robert L. Stern and Eugene Gressman, *Supreme Court Practice*, Second Edition—Revised Rules, July, 1954, pp. 125-126.

[3]*Dalehite v. United States*, 346 U. S. 15, 44-45.

[4]*United States v. Dickinson*, 331 U. S. 745, 748.

[5]"But, these officers were under direct mandate of Congress and the Executive to proceed."

[6]"Such (shock or blast) waves (by atomic detonation) are uncontrollable and unpredictable." *Cf.*, Finding XV [p. 3].

[7]"The United States, through previous experiments made by the Atomic Energy Commission knew that these shock waves were capable of extreme, erratic and uncontrollable destruction and property damage; that similar (though not necessarily the same intensity of) explosive tests had caused widespread damage * * *" Par. 7 Pretrial Order, Tr. 13.

We believe that since (as this Court may judicially notice) the United States has continued to and, apparently, will hereafter proceed to conduct these nuclear tests, the principles here involved justify the attempt to have the nation's highest tribunal to consider and determine whether, as is now indicated by this Court's decision, the party so damaged is without remedy—except the grace of a special act of Congress.

But the present decision, unless modified, would preclude such attempt because this Court has held (1) that appellant did not prove that the shock waves were the *proximate cause* of the damage to appellant's property (p. 5); (2) that there was evidence that such damage was caused by *other forces* (p. 5) and (3) that there is no applicable law because Nevada has not yet legislated or ruled by judicial decision upon such issue (p. 4).

We believe all three of these holdings are erroneous and without support by the record and ask this Court to delete or correct them.

We shall not make further references to the other errors heretofore listed as items 4 to 8 inclusive, although we believe each is an obvious error by this Court. We list them solely that it may not be contended by appellees in the future that we had waived the same.

ARGUMENT.

I.

The Record Requires This Court to Find That the Shock Waves Were the Proximate Cause of the Damage to Appellant's Property.

As this Court has held (p. 3), the law of Nevada controls here and such law requires a plaintiff (appellant here) to prove that the acts of the United States (the defendant charged) were the proximate cause of the ensuing damage (p. 5 and cases cited). Proximate cause is defined in judicial decisions by Nevada as

> "* * * that which immediately precedes and produces the effect as distinguished from remote (causes) * * *"
>
> *Lonabough v. V. T. & R. R. Co.,* 9 Nev. 271 quoted and approved in *Konig v. N. C. O. Ry.,* 36 Nev. 181, 212; 135 Pac. 141.

See also:

> *Wells Inc. v. Shoemake* (1947), 64 Nev. 57, 70; 177 P. 2d 451, 458; and
>
> *Smith v. Smith-Peterson Co.,* 56 Nev. 79, 94; 45 P. 2d 785-791.

To keep this brief within reasonable limits we will but summarize the evidence here. The construction of these buildings was exceptionally strong. Detailed inspection was made by an experienced contractor and builder on September 8, 1951 [Tr. 126-127] and, except in one place, there were no visible cracks in the plaster [Tr. 130]; the buildings were twice violently shaken during the occurrences of the atomic explosions of October 22

and November 5, 1951 (p. 2); immediately thereafter, the plaster in the walls and ceiling was cracked and the cracks kept spreading [Tr. 66 and 69] with a resulting damage to the buildings of $5,000.00 [Tr. 136] or more [Tr. 150-151]. Appellant, also *by express testimony* eliminated every other conceivable cause of such plaster cracking (App. Op. Br. pp. 13-14).

Yet, despite the fact that this evidence was entirely uncontradicted, the trial court could not find that the atomic explosions were the proximate cause of the damage and this Court has upheld such ruling and stated

> "But there was no proof that any damage was caused to the buildings thereby" (p. 5).

Appellant and its counsel are completely mystified. This Court has apparently conceded (as this record required it to do) that the atomic shock waves rushed in and around these buildings and the evidence is conclusive that there was *no damage before* and there *was damage immediately after* such "shakings". What other evidence, we respectfully inquire, must be produced to establish proximate cause?

As stated in page 5 of our opening brief, Nevada holds that where (as here) no other cause has intervened, the original cause, producing the damage, is the *proximate cause* (*Smith v. Smith-Peterson Co.,* 56 Nev. 79, 94; 45 P. 2d 785, 791).

We respectfully request that this Court amend and correct its judgment to so accord with the facts and such law.

II.

There Was No Evidence in This Record That the Damage to Appellant's Property Was Caused by Any Cause or Force Other Than the Concussions From These Atomic Explosions.

The trial court made no finding that there was such other cause. However, this Court said

> "There was some evidence that the damage was caused by other forces" (p. 5).

We respectfully request that such be *identified in the record* or that such statement be *deleted*. The vice of this erroneous statement, like the error referred to under Point I, is that if we seek certiorari, government counsel will point to them and say that it is unnecessary to reach the important constitutional questions upon which we will seek a ruling because *this Court has held that it was not atomic blasts but other causes which caused the damage* and the Supreme Court, in accord with its practice, will not examine the record to determine whether it does or does not support your factual statement.[8]

III.

Appellant Did Cite All Applicable Nevada Law.

This Court has held that appellant failed to cite applicable Nevada law. To the contrary, we researched that law from the beginning to the date of our briefs and explained expressly why we could not cite any which was applicable (*Cf.* Op. Br. p. 11, fn. 2). While this is not as vital as our first two points, we respectfully request that such erroneous charge be deleted.

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[8]See footnote 2, *supra*.

IV.

Where There Is No Nevada Law Governing the Subject Matter the Courts Resort to the Weight of Authority Established by State Law.

Lastly, it is not the law that, absent Nevada law on the subject, there is *no law* which this Court (or the lower Court) could apply. To the contrary, the Court should then "resort to the general doctrines of accepted tort law whence state judges derive their governing principles in novel cases."[9]

Britton v. Harrison Const. Co. (D. C. Tenn.), 87 Fed. Supp. 405, 407;

Dalehite v. United States, 346 U. S. 15, 53 (dissenting op.).

V.

Conclusion.

Without waiving appellant's objections to errors above listed and identified as numbers 4 to 8 inclusive, and assuming that this Court will probably adhere to its decision to affirm the lower Court's judgment we respectfully request and submit that it may do so upon the grounds stated in its prior opinion and at the same time correct and delete therefrom the erroneous statements that appellant did not establish the proximate cause of its damage, that the record disclosed a proximate cause thereof other than the shock waves from the atomic ex-

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[9]*Cf.* these state cases in addition to those submitted under Point V, pages 25-28, in appellant's opening brief: *Crino v. Campbell* (1941), 41 N. E. 2d 583, 585, 68 Ohio App. 391, and *Dixon v. N. Y. Trap Rock Co.* (1944), 58 N. E. 2d 517, 518, 293 N. Y. 509.

plosions, that appellant failed to supply this Court with applicable Nevada law and that there is no law which this Court could presently apply.

Respectfully submitted,

IRL DAVIS BRETT,

Attorney for Appellant.

Certificate of Counsel.

Pursuant to Rule 23, I certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

IRL DAVIS BRETT,

Attorney for Appellant.